

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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DIAMANTE FRAZIER, :
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Petitioner. :
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- v. - :
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UNITED STATES OF AMERICA, :
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Respondent. :
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S4 17 Cr. 364 (CS)
19 Cv. 8738 (CS)

**GOVERNMENT’S MEMORANDUM OF LAW IN OPPOSITION
TO DIAMANTE FRAZIER’S MOTION TO VACATE HIS CONVICTION**

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PRELIMINARY STATEMENT

Defendant Diamante Frazier seeks to vacate his conviction entered on April 3, 2019, in the United States District Court for the Southern District of New York, following his guilty plea.

Superseding indictment S4 17 Cr. 364 (CS) (the “Indictment”) was filed on September 12, 2018, against Frazier (the “defendant”) and twelve other defendants. The fourteen-count Indictment charged Frazier with (1) racketeering conspiracy, in violation of Title 18, United States Code Section 1962(d) (Count One); (2) assault with a dangerous weapon and attempted murder in aid of racketeering activity, in violation of Title 18, United States Code, Sections 1959(a)(3), 1959(a)(5), and 2 (Count Two); (3) narcotics conspiracy, in violation of Title 21, United States Code, Section 841(a)(1), 841(b)(1)(A), and 846 (Count Three); and (4) brandishing and discharging firearms in furtherance of the Count Two attempted murder and the Count Three narcotics conspiracy, in violation of Title 18, United States Code, Sections 924(c) and 2 (Count Fourteen).

On October 17, 2018, Frazier pled guilty pursuant to a plea agreement with the Government (the “Plea Agreement”). Under the terms of the Plea Agreement, among other things, Frazier agreed to plead guilty to Count Three of the Indictment, charging him with participating in a

conspiracy to distribute narcotics and to brandishing firearms in furtherance of the narcotics conspiracy and to the attempted murder charged in Count Two, which was a lesser-included charge of Count Fourteen of the Indictment, and the Government agreed to dismiss the remaining charges in the Indictment. On April 2, 2019, the Court imposed a sentence of 36 months' incarceration on Count Three and 84 months' incarceration on Count Fourteen, to run consecutively, for a total of 120 months' incarceration, along with four years' supervised release and a \$200 special assessment. Frazier is currently serving his sentence.

As discussed further below, Frazier has moved pursuant to 28 U.S.C § 2255 to vacate, set aside, or correct his sentence as to Count Fourteen, purporting to rely on *United States v. Davis*, 139 S. Ct. 2319 (2019). Because Frazier's Section 924(c) conviction was predicated on crimes that remain valid predicates post-*Davis*, his motion must be denied.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

I. The Offense Conduct

The factual record makes plain that Frazier committed the Section 924(c) offense both in furtherance of an assault with a dangerous weapon and attempted murder in aid of racketeering and in furtherance of a narcotics conspiracy. As described in the presentence investigation report ("PSR") to which Frazier agreed at his sentencing hearing, Frazier was a member of Southside, a violent street gang that sold heroin and crack cocaine in Newburgh, New York (Presentence investigation report ("PSR") ¶¶ 29, 33, attached as Ex. A).¹ Southside members, including Frazier, used violence to defend Southside's drug territory against rival gangs, the most prominent of which was the Yellow Tape Money Gang ("YTMG"). (PSR ¶¶ 29, 33-35). One such act of violence was

¹ The PSR is included in the hard-copy version of this submission but has not been filed electronically.

the December 11, 2015 assault with a dangerous weapon and attempted murder of YTMG members. (PSR ¶ 34). When members of YTMG drove into Southside territory, Frazier and Southside leader Skylar Davis brandished firearms, and Davis fired at the car, causing the car to crash. (*Id.*). Furthermore, Frazier regularly carried a firearm in connection with his drug dealing and sold one firearm to a confidential informant to whom he had previously sold heroin. (PSR ¶ 33). Frazier promoted Southside's violence, drug dealing, and use of firearms on social media and in rap videos. (PSR ¶ 35).

II. The Plea Agreement

Frazier pled guilty to lesser-included offenses of the crimes charged in Counts Three and Fourteen of the Indictment pursuant to a plea agreement with the Government (the "Plea Agreement" attached as Ex. B).² Among other things, the Plea Agreement noted that Count Fourteen charged Frazier with using, carrying, and possessing firearms during and in relation to both the crime of violence charged in Count Two of the Indictment (the December 11, 2015 assault and attempted murder) and the narcotics conspiracy charged in Count Three of the Indictment, but that under the terms of the agreement, the Government would accept a plea of guilty to the lesser included offense of brandishing firearms during and in relation to the assault with a dangerous weapon and attempted murder charged in Count Two. (Plea Agr. 1-2). The Plea Agreement specifically noted that Frazier agreed that his guilty plea to Count Fourteen includes an admission to his brandishing of a firearm in connection with Count Two. (Plea Agr. 2 n.1). Frazier also agreed to plead guilty to a lesser included offense of Count Three, conspiracy to distribute mixtures and substances containing a detectable amount of heroin. (Plea Agr. 1). In consideration of

² The Plea Agreement is included in the hard-copy version of this submission but has not been filed electronically.

Frazier's plea of guilty to lesser included offenses of Counts Three and Fourteen, the Government agreed to dismiss the remaining charges in the Indictment. (Plea Agr. 2). The Plea Agreement stipulated that the Guidelines Range was 51 to 63 months' imprisonment for Count Three and the mandatory minimum sentence of 84 months' imprisonment on Count Fourteen, for a total of 135 to 147 months' imprisonment. (Plea Agr. 4).

As part of the Plea Agreement, Frazier stipulated that he would "not file a direct appeal; nor bring a collateral challenge, including but not limited to an application under Title 28, United States Code, Section 2255 and/or Section 2241; nor seek a sentence modification pursuant to Title 18, United States Code, Section 3582(c), of any sentence at or below the Stipulated Guidelines Range of 135 to 147 months' imprisonment." (Plea Agr. 5). The parties agreed, however, that the Frazier reserved his rights to file claims of ineffective assistance of counsel on direct appeal or collateral review. (Plea Agr. 6).

Frazier acknowledged in the Plea Agreement that he had accepted the agreement and decided to plead guilty because he is in fact guilty. (Plea Agr. 6).

The parties further agreed, among other things, that any defenses based on statute of limitations were waived with respect to any prosecution that was not time-barred as of the date that the Plea Agreement was signed. (Plea Agr. 6).

III. The Guilty Plea Hearing

At the guilty plea hearing, Frazier was placed under oath. (Plea Tr. 3, attached as Ex. C). Among other things, the Government correctly summarized the elements of Count Fourteen, including that Frazier committed used, carried, or possessed a firearm during and in relation to a crime of violence, specifically an attempted murder for the purpose of maintaining and increasing his position in an enterprise engaged in racketeering activity, on December 11, 2015 in the vicinity

of South and Liberty Streets in Newburgh and that the firearm was brandished. (Plea Tr. 9-10). The Court correctly advised Frazier that the maximum possible penalty for the crime charged in Count Fourteen was life, with a mandatory minimum term of imprisonment of seven years, which must run consecutively to any other sentence. (Plea Tr. 13-14).

Frazier confirmed that no one had coerced or threatened him in any way to induce him to plead guilty. (Plea Tr. 19-20). He stated that he had read the written Plea Agreement, signed it, read it prior to signing it, discussed it with his attorney, and that he understood the Plea Agreement. (Tr. 19). Frazier further stated that he understood that under the terms of the Plea Agreement he was giving up his right to challenge his sentence, on direct appeal or otherwise, as long as he was sentenced to a prison term of no more than 147 months' incarceration. (Plea Tr. 20-21). Frazier confirmed that his guilty plea was voluntary and made of his own free will and that he was in fact guilty of the charge of brandishing a firearm during and in relation to a December 11, 2015 assault with a dangerous weapon and attempted murder. (Plea Tr. 28).

When asked to state in his own words what he did to make him guilty of Count Fourteen, Frazier said that he was part of the Southside gang, and that to maintain his position in that gang he brandished a firearm on December 11, 2015 when other members of Southside intentionally shot at members of a rival gang in Newburgh. (Plea Tr. 24). Frazier confirmed that Southside was a group of people who associated together for the purpose of committing crimes, that he understood that members of the gang were going to commit multiple crimes, and that he understood that those crimes included selling drugs. (Plea Tr. 25). Frazier further allocuted to his own participation in selling heroin with other people in Newburgh. (Plea Tr. 24, 26). The attorney for the Government included the following in the summary of the proof:

If the case were to proceed to trial, the government would expect to prove with respect to Count Three that from in or about at least 2014 through in or about June 2017, the defendant sold heroin in Newburgh

as part of his membership in the Southside Gang, which was a violent street gang that sold crack cocaine and heroin and used violence, including shootings and robberies, to defend its drug turf against other rival gang members, including members of a rival Newburgh gang known as the Yellow Tape Money Gang or YTMG. . . .

With respect to Count Fourteen, the government would expect to prove that on or about December 11, 2015, the defendant was in the vicinity of South Street and Liberty Street in Newburgh in the heart of Southside Gang territory with Skylar Davis, a/k/a S-Dot, and other Southside members. The defendant was carrying a firearm, which he showed off to a cooperating witness. While Frazier, Davis and others were outside, a black car driven by a rival YTMG gang member came down the street, and another YTMG member began shooting at the Southside members. Frazier and Davis pulled their guns, and Davis fired back at the car.

(Plea Tr. 21-22). Frazier did not object to that factual summary.

IV. The Sentencing Hearing

Frazier was sentenced primarily to 120 months' incarceration on April 2, 2019. At the sentencing hearing, Frazier told the Court that he had had an opportunity to review the PSR and that, other than a change agreed to by both parties specifying that it was Frazier's co-defendant who fired shots at the YTMG car, he had no objections to its factual accuracy. (Sent. Tr. 3, attached as Ex. D). As previously discussed in the Offense Conduct section, *supra*, the PSR described Frazier's drug-dealing and firearms possession as part of his membership in Southside, Southside's engagement in acts of violence to protect its drug-dealing territory, and the events surrounding the December 11, 2015 attempted murder. In discussing the seriousness of the offense, the Court observed the following about Frazier:

This defendant not only did his drug dealing in coordination with a violent gang, therefore, capitalized on its reputation, but he was a big part of why it had that reputation. . . . This defendant, from what I can tell, loved being in the gang, boasted about it, bragged about it, enjoyed the ratcheting up of the rivalry with the other gang, didn't think twice about the violence, toted a gun, even sold one, and didn't give any thought to the danger he was putting himself in or the danger he was bringing on his community. So, it would be an

extremely serious offense even if the defendant were not involved in the encounter, I'll say, with YTMG in which he didn't fire his gun, thank God, thank God, but he brandished his gun during a shootout. . . . Dealing drugs is bad. Dealing drugs with a gun is bad. Dealing drugs as part of a violent gang is bad. And being an enthusiastic member who glorifies the violence of that gang is bad, so this is a bad offense.

(Sent. Tr. 15-16).

At the conclusion of the sentencing hearing, the Court informed Frazier that he had the right to appeal his conviction and sentence, to the extent he had not given up those rights through his plea agreement. (Sent. Tr. 22). The Court further advised Frazier that he could apply for leave to appeal *in forma pauperis* if he could not pay the cost of the filing fees and that the notice of appeal must be filed within fourteen days of the judgment of conviction. (*Id.*). Frazier did not file a direct appeal.

V. The Instant Motion

On September 19, 2019, Frazier, proceeding *pro se*, timely filed a motion under 28 U.S.C. § 2255 to vacate, set aside, or correct his sentence as to Count Fourteen. Frazier asserts that he is “actually innocent” of brandishing a firearm during and in relation to a crime of violence. (Mot. (Dkt. 459) 4). Although Frazier correctly notes that “the underlying act[] supporting the 924(c) is the December 11, 2015 assault with a dangerous weapon and attempted murder,” he goes on to analyze his legal claim as if his Section 924(c) conviction were predicated on a racketeering conspiracy charge (Mot. 4-5), which it was not. *United States v. Davis*, 139 S. Ct. 2319 (2019), which held that the definition of “crime of violence” found in 18 U.S.C. § 924(c)(3)(B) is unconstitutionally vague and therefore unenforceable, therefore has no bearing on Frazier’s offense of conviction. Frazier cannot show, and in fact does not argue, that he is innocent of brandishing a firearm in furtherance of the assault with a dangerous weapon and attempted murder;

in fact, he is demonstrably and clearly guilty of doing so. Therefore, Frazier's motion should be denied in its entirety without a hearing.

ARGUMENT

I. Frazier's Claim is Procedurally Barred

Any claim based on *Johnson I* and its progeny fails because it is procedurally defaulted as a result of Frazier's failure to raise it in any direct appeal. Frazier offers no meaningful explanation for his decision not to raise these claims on direct appeal and, thus cannot show just cause for the failure. Nor, in the face of the overwhelming evidence of his involvement in the December 11, 2015 assault and attempted murder—not to mention his involvement in drug trafficking and his use and possession of firearms in furtherance of Southside's drug trafficking activities, which resulted in the brandishing and discharge of numerous firearms—can he show resulting prejudice or that he is actually innocent. As a result, Frazier's *Davis* claim is procedurally barred and should be denied.

A. Applicable Law

1. Section 924(c)

A defendant is guilty of violating Section 924(c) if he used or carried a firearm during and in relation to, or possessed a firearm in furtherance of, a "crime of violence" or "drug trafficking crime." 18 U.S.C. § 924(c)(1)(A). A "crime of violence" is defined as a felony that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another" (the "force clause" or "elements clause") or "by its nature . . . involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense" (the "risk-of-force clause" or the "residual clause"). *Id.* § 924(c)(3)(A), (B).

The Supreme Court recently invalidated as unconstitutionally vague Section 924(c)(3)(B)’s risk-of-force clause. *See United States v. Davis*, 139 S. Ct. 2319 (2019). However, the validity of the “force clause” definition of Section 924(c)(3)(A), and the definition of “drug trafficking crime” set forth in Section 924(c)(2) remain undisturbed by *Davis* or otherwise.

2. Section 2255

The Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), Pub. L. No. 104-132, 110 Stat. 1214, 1217, subjects petitions for relief pursuant to Title 28, United States Code, Section 2255 to a one-year statute of limitations, which runs from the latest of several specified events, including “the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review.” 28 U.S.C. § 2255(f)(3). A defendant may properly claim in a § 2255 motion that, based on an intervening Supreme Court decision, his conviction was for “an act that the law does not make criminal.” *Davis v. United States*, 417 U.S. 333, 346 (1974). The recent *Davis* decision, as a new substantive rule of constitutional law, applies retroactively to final criminal convictions. *See Welch v. United States*, 136 S. Ct. 1257, 1266 (2016).

“Habeas review is an extraordinary remedy and will not be allowed to do service for an appeal.” *Bousley v. United States*, 523 U.S. 614, 621 (1998) (internal quotations omitted); *United States v. Frady*, 456 U.S. 152, 165 (1982) (“[W]e have long and consistently affirmed that a collateral challenge may not do service for an appeal.”). This bedrock principle arises from concerns of finality in criminal judgments. *See McCleskey v. Zant*, 499 U.S. 467, 490-91 (1991) (“Without finality, the criminal law is deprived of much of its deterrent effect. And when a habeas petitioner succeeds in obtaining a new trial, the erosion of memory and dispersion of witnesses that occur with the passage of time prejudice the government and diminish the chances of a reliable

criminal adjudication.”) (internal quotations and citations omitted). The interest in finality has “special force” for convictions based on guilty pleas. *Lucas v. United States*, 963 F.2d 8, 14 (2d Cir. 1992) (quoting *United States v. Timmreck*, 441 U.S. 780, 784 (1979)). “The impact of inroads on finality is greatest in the context of guilty pleas because the vast majority of criminal convictions result from such pleas and because ‘the concern that unfair procedures may have resulted in the conviction of an innocent defendant is only rarely raised by a petition to set aside a guilty plea.’” *Id.*

In accordance with the interest in finality, a court may not consider on a Section 2255 motion a claim that could have been raised, but was not raised, on direct review. Such a claim has been “procedurally defaulted.” *Bousley*, 523 U.S. at 622; *United States v. Thorn*, 659 F.3d 227, 231 (2d Cir. 2011) (“In general, a defendant is barred from collaterally challenging a conviction under § 2255 on a ground that he failed to raise on direct appeal.”). When a convicted defendant seeks collateral relief based on a claim he has procedurally defaulted by failing to raise it at trial, sentencing, or on direct appeal, he generally must show both cause excusing his procedural default and prejudice resulting from the errors of which he complains. *Bousley*, 523 U.S. at 622 (citing *Murray v. Carrier*, 477 U.S. 478, 485 (1986); *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977)); see also *Frady*, 456 U.S. at 167-68. If the defendant cannot show both cause and prejudice, the court may consider his claim only if he establishes that he is “actually innocent.” *Bousley*, 523 U.S. at 624.

The “cause” requirement means that a defendant “was impeded by some objective factor external to the defense, such as governmental interference or the reasonable unavailability of the factual basis for the claim.” *McCleskey*, 499 U.S. at 468. The claim must be “so novel that its legal basis is not reasonably available to counsel.” *Bousley*, 523 U.S. at 622 (quoting *Reed v. Ross*,

468 U.S. 1, 16 (1984)); *Strickler v. Greene*, 527 U.S. 263, 283 n.24 (1999) (a change in law may constitute cause if there is “a showing that the factual or legal basis for a claim was not reasonably available to counsel” at the time). Alternatively, the cause requirement can be met by a showing of futility, such as if “prior state case law has consistently rejected a particular constitutional claim.” *DiSimone v. Phillips*, 461 F.3d 181, 191 (2d Cir. 2006). However, futility does not constitute cause if a claim is merely “unacceptable” to a particular court at a particular time. *Id.* (quoting *Bousley*, 523 U.S. at 623, and *Engle v. Isaac*, 456 U.S. 107, 130 n.35 (1982)).

An appellate or collateral attack waiver in a plea agreement does not constitute adequate cause for default. *Pollack v. Hobbs*, 98 F. Supp. 2d 287, 291 (E.D.N.Y. 2000), *aff’d*, 8 F. App’x 37 (2d Cir. 2001) (“Having received the benefit of his Rule 11(e)(1)(C) bargain, [the petitioner] is hardly in a position to cite an advantageous ‘agreement’ under which he promised not to appeal his conviction as an excuse for procedural default, particularly on a claim of which he was well aware before he pled guilty.”); *United States v. Pipitone*, 67 F.3d 34, 39 (2d Cir. 1995) (appeal waiver in plea agreement did not excuse procedural default in collateral challenge to conviction) (collecting cases).³

“The ‘prejudice’ requirement is met by establishing actual prejudice resulting from the errors of which Petitioner complains. The error must have resulted in substantial disadvantage, infecting the entire trial with error of constitutional dimensions.” *Gutierrez v. Smith*, 702 F.3d 103, 112 (2d Cir. 2012) (quoting *Frady*, 456 U.S. at 168 and *Murray v. Carrier*, 477 U.S. 478, 494 (1986)) (internal citations and quotations omitted). In the guilty plea context, a defendant must

³ The Government does not argue that the collateral attack waiver in the plea agreement bars Frazier from bringing his claim at all. To the contrary, it is because that waiver—which goes only to Frazier’s sentence, not to the validity of his convictions—does not bar his motion that its existence cannot be cause for his failure to raise this issue on direct appeal.

demonstrate that his plea was infected with a fundamental error “which inherently result[ed] in a complete miscarriage of justice or an omission inconsistent with the rudimentary demands of fair procedure.” *Timmreck*, 441 U.S. at 783. To establish actual prejudice, the defendant must show that he would not have pled guilty had he known of the error. *Id.* at 784 (habeas petitioner alleging a violation of Rule 11 cannot show that the error “resulted in a ‘complete miscarriage of justice’ or in a proceeding ‘inconsistent with the rudimentary demands of fair procedure’ ” when he does not argue that “if he had been properly advised by the trial judge, he would not have pleaded guilty”); *Lucas*, 963 F.2d 8, 13 (2d Cir. 1992) (prejudice can be established by demonstrating that the defendant “did not understand the consequences of his plea, or that, if he had been properly advised, he would not have pled guilty”); *see also Hill v. Lockhart*, 474 U.S. 52, 59 (1985) (in the context of a claim of ineffective assistance of counsel, “to satisfy the ‘prejudice’ requirement, the defendant must show that there is a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.”).

To establish actual innocence, a petitioner must demonstrate that “in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him.” *Bousley*, 523 U.S. at 623 (quoting *Schlup v. Delo*, 513 U.S. 289, 327-28 (1995)). In this context actual innocence means factual innocence, not legal insufficiency. *Id.* (citing *Sawyer v. Whitley*, 505 U.S. 333, 339 (1992)).

B. Discussion

The Government does not dispute that under *Davis*, Frazier’s 924(c) conviction in Count Fourteen could not be sustained if it had relied solely on a RICO conspiracy predicate. But because it did not, his motion should be denied. Frazier was charged and convicted of the firearms offense here in furtherance of two predicate violent crimes, assault with a dangerous weapon and attempted

murder in aid of racketeering, which are unaffected by *Davis*. Because he cannot show either innocence or cause for and prejudice from failing to raise the issue in the proceedings below or on direct appeal, Frazier’s *Davis* claim is procedurally barred. Frazier does not meaningfully attempt to allege that he is actually innocent of the charge to which he pled guilty. Even if he had argued his innocence, the significant factual record developed at his guilty plea and sentencing hearings forecloses the possibility that Frazier could demonstrate his factual innocence.

**1. Frazier Cannot Show Cause for or Prejudice from His Failure to Challenge
his Count Fourteen Conviction on Direct Appeal**

Frazier has not asserted an objective factor external to the defense that would constitute sufficient cause for his failure to challenge the constitutionality of the Section 924(c) residual clause prior to raising it in his habeas motion. First, he has not demonstrated the reasonable unavailability of the factual basis for the claim at the time of his guilty plea, which would require showing that the theory adopted in *Davis* was “so novel that its legal basis [was] not reasonably available to counsel.” *Bousley*, 523 U.S. at 622 (citing *Reed v. Ross*, 468 U.S. 1, 16 (1984)). Indeed, *Davis*’s central holding was explicitly premised on the Supreme Court’s earlier decisions in the *Johnson v. United States*, 135 S. Ct. 2551 (2015) line of cases, which had been decided at the time of Frazier’s plea, cases Frazier now cites. (*See* Mot. 5); *see also Davis*, 139 S. Ct. at 2325–27 (discussing import of previous decisions in *Johnson* and *Dimaya* to the question presented in *Davis*). Nor could Frazier contend that his default should be excused due to the futility of attacking the constitutionality of the Section 924(c) risk-of-force clause, for similar reasons. Futility does not constitute cause if the claim was merely “unacceptable” to a particular court at a particular time. *DiSimone*, 461 F.3d at 191; *see also Bousley*, 523 U.S. at 622–23 (“futility cannot constitute cause if it means simply that a claim was ‘unacceptable to that particular court at that particular

time.’ ”) (quoting *Engle v. Isaac*, 456 U.S. 107, 130 n.5 (1982)). In short, the interpretation of the Section 924(c) residual clause set forth in *Davis* was previously available.

Second, although Frazier does not raise the appeal waiver in his plea agreement as a cause justifying his procedural default, such an argument would be without merit, “particularly on a claim of which he was well aware before he pleaded guilty.” *Pollack v. Hobbs*, 98 F. Supp. 2d 287, 291 (E.D.N.Y. 2000), *aff’d*, 8 F. App’x 37 (2d Cir. 2001); *see also United States v. Pipitone*, 67 F.3d 34, 39 (2d Cir. 1995) (appeal waiver in plea agreement did not excuse procedural default in collateral challenge to conviction) (collecting cases).

Third, Frazier does not raise even a conclusory assertion that his failure to raise the alleged *Davis* claim actually prejudiced him. He “must shoulder the burden of showing, not merely that the errors . . . created a *possibility* of prejudice, but that they worked to his *actual* and substantial disadvantage, infecting [the proceedings] with error of constitutional dimensions,” *Frady*, 456 U.S. at 170 (discussing in the context of a habeas petition following a trial, not a guilty plea), and resulted in a “complete miscarriage of justice,” *Timmreck*, 441 U.S. at 784. Although he refrains from making any prejudice argument, Frazier could not credibly claim that he would not have pled guilty and would have proceeded to trial, given the overwhelming evidence of his guilt. Furthermore, as summarized previously, the evidence proffered by the Government during the change of plea hearing and the facts set forth in the PSR make abundantly clear that there was overwhelming proof of Frazier’s guilt not just of the lesser included offenses of Counts Three and Fourteen to which Frazier pled, but also of Frazier’s extensive and regular use of firearms as part of his drug-dealing activity. Likewise, the evidence showed that Southside’s acts of violence, including the December 11, 2015 shooting, were committed in large part by Frazier and other Southside members to defend drug territory against rival gangs.

2. Frazier Is Not Actually Innocent

Having failed to demonstrate cause and actual prejudice, Frazier can only prevail by establishing actual innocence. This requires him to show not just his legal innocence, but that he is factually innocent of the charge in Count Fourteen. *See Bousley*, 523 U.S. at 623. Frazier, who bears the burden of establishing his innocence, cannot possibly do so in light of the existing record. Frazier pled guilty to a plea agreement stating that he used firearms in furtherance of an assault with a dangerous weapon and an attempted murder in aid of racketeering, and Frazier further agreed in the plea agreement to acknowledge his participation in that assault and attempted murder. In the same plea agreement, Frazier also admitted to participation in a narcotics conspiracy. Furthermore, as the Court knows, the Southside gang to which he admitted membership was in significant part a narcotics conspiracy. Frazier was sold a firearm to one of his narcotics customers, he regularly carried a firearm while dealing drugs, and he bragged on social media about possessing guns and drugs. Southside's acts of violence, including the December 11, 2015 shooting during which Frazier brandished a firearm, were motivated in significant part by the need to defend drug-dealing territory against rivals.

Frazier's cursory petition makes no effort to grapple with the overwhelming factual record establishing his guilt of Count Fourteen. Indeed, Frazier does not address his membership in Southside, his participation in drug dealing, or his participation in the December 11, 2015 attempted murder. However, even if he had now denied his participation in that criminal activity, his allocution at the change of plea hearing alone establishes that he cannot be factually innocent of Count Fourteen, and there is no reason to doubt his sworn statements to the Court. *See Acevedo v. United States*, No. 07 Cr. 378, 2012 WL 3764544, at *4 (S.D.N.Y. Aug. 30, 2012) ("There is a 'strong presumption of accuracy' accorded a defendant's statements during a plea allocution.")

(quoting *United States v. Juncal*, 245 F.3d 166, 171 (2d Cir. 2001)). Nor does Frazier address the undisputed factual recitations in the PSR of his participation in the charged narcotics conspiracy, his participation in the December 11, 2015 attempted murder, nor the fact that Southside members were engaged in a violent rivalry with YTMG members. The factual record developed in the prior proceedings—including statements Frazier himself made to the Court during his plea allocation and factual recitations by the Government, the Court, and the Probation Office at the plea and sentencing hearings to which Frazier did not object—definitively forecloses any argument that Frazier is factually innocent. Frazier, a gun-brandishing Southside member and drug dealer, cannot demonstrate actual, factual innocence of brandishing firearms in furtherance of assault with a dangerous weapon and attempted murder in aid of racketeering. His *Davis* claim should be denied.

II. Frazier’s Claim Fails on the Merits Because Assault with a Dangerous Weapon and Attempted Murder Are Crimes of Violence Under the Force Clause

Although correctly noting that the categorical approach requires courts to analyze whether predicate crimes constitute “crimes of violence” by looking only to their elements and not to the underlying facts (Mot. 5), Frazier fails to analyze the correct predicate crimes: here, assault with a dangerous weapon and attempted murder. *United States v. Davis*, 139 S. Ct. 2319 (2019), accordingly has no bearing on Frazier’s conviction.

As previously noted, Section 924(c) defines “crime of violence” as a felony that “has as an element the use, attempted use, or threatened use of physical force against the person or property of another” (the “force clause” or “elements clause”); whereas the *Davis* invalidated the “risk-of-force clause” or the “residual clause”). 18 U.S.C. § 924(c)(3)(A), (B). The Government agrees that a RICO conspiracy, such as the one charged in Count One of the Indictment, would not satisfy the “force clause” definition of Section 924(c)(3)(A), and that it therefore could not have served

as a “crime of violence” to support a conviction under Section 924(c). However, Frazier’s Section 924(c) conviction was not predicated on RICO conspiracy.

Frazier does not argue that assault with a dangerous weapon and attempted murder in aid of racketeering are not crimes of violence under the force clause, and any such argument would be entirely without merit. *See, e.g., Singh v. Barr*, 939 F.3d 457, 464 (2d Cir. 2019) (holding that second-degree assault with a deadly weapon or dangerous instrument under New York Penal Law § 120.05(2) is a crime of violence under the identically worded 18 U.S.C. § 16(a) definition of a crime of violence); *United States v. Sierra*, 782 F. App’x 16, 20 (2d Cir. 2019) (holding that murder in aid of racketeering and assault and attempted murder in aid of racketeering are crimes of violence under the force clause, and noting that the Second Circuit has “repeatedly treated it as self-evident that under New York law ‘attempted murder is a crime unmistakably involving an attempted use of physical force.’” (quoting *United States v. Praddy*, 729 F. App’x 21, 24 (2d Cir. 2018))); *see also Mayes v. United States*, No. 12-CR-0385, 2019 WL 6307411, at *3 (E.D.N.Y. Nov. 25, 2019) (finding that federal attempted murder in aid of racketeering is also a crime of violence under § 924(c)(3)(A)) (collecting cases).

Accordingly, even if Frazier’s claim was not procedurally barred, it must fail on the merits.

CONCLUSION

Frazier motion to vacate his conviction should be denied, and no certificate of appealability should issue because the petitioner has not made a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c).

Dated: New York, New York
March 10, 2020

Respectfully submitted,

GEOFFREY S. BERMAN
United States Attorney for the
Southern District of New York

By: /s/ Allison Nichols
Allison Nichols
Maurene Comey
Jacqueline Kelly
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AFFIRMATION OF SERVICE

ALLISON NICHOLS, pursuant to Title 28, United States Code, Section 1746, hereby declares under the penalty of perjury:

That I am an Assistant United States Attorney in the Office of the United States Attorney for the Southern District of New York. That, on March 10, 2020, I caused a copy of the Government's Memorandum of Law in Opposition to Diamante Frazier's Motion to Vacate His Conviction to be delivered by First Class mail to:

DIAMANTE FRAZIER 79257-054
FCI FORT DIX
FEDERAL CORRECTIONAL INSTITUTION
P.O. BOX 2000
JOINT BASE MDL, NJ 08640

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated: New York, New York
March 10, 2020

/s/ Allison Nichols
Allison Nichols
Maurene Comey
Jacqueline Kelly
Samuel Raymond
Assistant United States Attorneys
Tel: (212) 637-2366

EXHIBIT A

EXHIBIT B

EXHIBIT C

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

-----x

3 UNITED STATES of AMERICA,

4 -against-

17 Cr. 364 (CS)
Plea

5 DIAMANTE FRAZIER,

6 Defendant .

7 -----x

8
9 United States Courthouse
10 White Plains, New York

11 October 17, 2018

12 THE HONORABLE CATHY SEIBEL,
13 District Court Judge

14
15 GEOFFREY S. BERMAN
16 United States Attorney for
the Southern District of New York
17 BY: JACQUELINE C. KELLY
Assistant United States Attorney

18
19 LLOYD EPSTEIN
20 Attorney for Diamante Frazier

1 THE CLERK: The Honorable Cathy Seibel presiding.
2 United States v Frazier.

3 THE COURT: Good afternoon, Ms. Kelly, Mr. Epstein,
4 Mr. Frazier. Everyone can have a seat.

5 Am I correct, Mr. Epstein, that your client's
6 prepared to enter a plea?

7 MR. EPSTEIN: Yes, your Honor, a guilty plea to
8 Counts Three and Fourteen.

9 THE COURT: Let me ask Mr. Clark to place Mr. Frazier
10 under oath.

11 (Diamante Frazier sworn)

12 THE CLERK: Please state your full name for the
13 record and spell it out slowly.

14 THE DEFENDANT: Diamante Frazier, D-I-A-M-A-N-T-E,
15 F-R-A-Z-I-E-R.

16 THE COURT: Thank you, Mr. Frazier. You can have a
17 seat.

18 This plea is to the S4 indictment. We have not
19 arraigned this defendant on the S4; correct?

20 MS. KELLY: That's correct, your Honor.

21 THE COURT: Let's do that briefly.

22 MR. EPSTEIN: Your Honor, I have gone over the
23 indictment with my client. We waive the reading of it, and we
24 enter a plea of not guilty, and I'll withdraw the plea of not
25 guilty, and enter a plea of guilty to Counts Three and

1 Fourteen.

2 THE COURT: You're convinced your client understands
3 what he's charged with?

4 MR. EPSTEIN: Yes.

5 THE COURT: All right.

6 Mr. Frazier, you've seen the indictment which is
7 marked S4 17CR364.

8 THE DEFENDANT: Yes, ma'am.

9 THE COURT: Gone over it with your lawyer?

10 THE DEFENDANT: Yes, ma'am.

11 THE COURT: You understand what you're charged with?

12 THE DEFENDANT: Yes, ma'am.

13 THE COURT: All right. Do you understand that you're
14 now under oath, and if you answer any of my questions falsely,
15 your false answers could later be used against you in a
16 separate prosecution for perjury or making a false statement?

17 THE DEFENDANT: Yes, ma'am.

18 THE COURT: How old are you?

19 THE DEFENDANT: Twenty-five.

20 THE COURT: How far did you go in school?

21 THE DEFENDANT: College.

22 THE COURT: So you're able to read, write, speak and
23 understand English?

24 THE DEFENDANT: Yes.

25 THE COURT: Are you now or have you recently been

1 under the care of a doctor or psychiatrist.

2 THE DEFENDANT: No.

3 THE COURT: Have you ever been treated or
4 hospitalized for any mental illness or any type of addiction?

5 THE DEFENDANT: Nope.

6 THE COURT: In the past 24 hours, have you taken any
7 drugs, medicine or pills or drunk any alcohol?

8 THE DEFENDANT: No.

9 THE COURT: Is your mind clear today?

10 THE DEFENDANT: Yes.

11 THE COURT: You feeling all right?

12 THE DEFENDANT: Yes.

13 THE COURT: Now you understand you want to plead
14 guilty to Count Three and Count Fourteen; is that correct?

15 THE DEFENDANT: Yep.

16 THE COURT: Have you had a full opportunity to
17 discuss your case with your lawyer and to discuss the
18 consequences of pleading guilty?

19 THE DEFENDANT: Yes.

20 THE COURT: Are you satisfied with Mr. Epstein and
21 his representation of you?

22 THE DEFENDANT: Yep.

23 THE COURT: Does either counsel have any doubt as to
24 the defendant's competence to plead at this time?

25 MS. KELLY: No, your Honor.

1 MR. EPSTEIN: No, your Honor.

2 THE COURT: On the basis of Mr. Frazier's responses
3 to my questions, my observations of his demeanor and the views
4 of counsel, I find that he is fully competent to enter an
5 informed plea at this time.

6 Before I take your plea, though, Mr. Frazier, I'm
7 going to ask you questions in order to satisfy myself that you
8 are guilty and that you fully understand the consequences of
9 your plea.

10 First I'm going to describe certain rights you have
11 under the Constitution and laws of the United States, which
12 rights you'll be giving up if you plead guilty. Please listen
13 carefully. If I say anything that you don't understand, stop
14 me, and either Mr. Epstein or I will explain it further. Okay?

15 THE DEFENDANT: Okay.

16 THE COURT: You have the right to be represented by
17 counsel at trial and at every stage of the case, and if you
18 could not afford counsel, counsel would be appointed to
19 represent you for free; do you understand that?

20 THE DEFENDANT: Yep.

21 THE COURT: You have a right to a speedy and public
22 trial by a jury on the charges against you; do you understand
23 that?

24 THE DEFENDANT: Yep.

25 THE COURT: If there were a trial, you would be

1 presumed innocent and the government would be required to prove
2 you guilty by competent evidence and beyond a reasonable doubt.
3 You would not have to prove you were innocent at a trial; do
4 you understand that?

5 THE DEFENDANT: Yes.

6 THE COURT: If there were a trial, a jury composed of
7 12 people selected from this district would have to find
8 unanimously that you were guilty. In other words, you could
9 only be found guilty if all 12 agreed that you were guilty; do
10 you understand that?

11 THE DEFENDANT: Yes.

12 THE COURT: If there were a trial, you would have a
13 right to see and hear all the witnesses against you and your
14 lawyer could cross examine them. You would have the right to
15 have your lawyer object to the Government's evidence and offer
16 evidence on your behalf, if you so desired, and you would have
17 the right to have subpoenas issued to compel witnesses to come
18 to Court if you wanted to call them to testify in your defense;
19 do you understand that?

20 THE DEFENDANT: Yes.

21 THE COURT: If there were a trial, you would have the
22 right to testify if you wanted to, but no one could force you
23 to testify if you did not want to.

24 Further, no inference or suggestion of guilt could be
25 drawn if you chose not to testify at a trial. In other words,

1 the jury would be told that it could not hold it against you if
2 you chose not to testify; do you understand that?

3 THE DEFENDANT: Yes.

4 THE COURT: Do you understand that by pleading guilty
5 today you will be giving up all the rights I have described,
6 except the right to counsel?

7 THE DEFENDANT: Yes.

8 THE COURT: Do you understand that, except for the
9 right to counsel, you're waiving these rights going forward and
10 giving them up for the rest of the case?

11 THE DEFENDANT: Yes.

12 THE COURT: Do you understand you will have no trial
13 and you will be found guilty based just on your plea of guilty?

14 THE DEFENDANT: Yes.

15 THE COURT: Do you understand it's completely your
16 choice whether to plead guilty or go to trial?

17 THE DEFENDANT: Yes.

18 THE COURT: Do you understand if you wanted to change
19 your mind right now and decide not to plead guilty, that would
20 be okay?

21 THE DEFENDANT: Yes.

22 THE COURT: Now you've gotten a copy of the
23 indictment which is marked S4 17CR364?

24 THE DEFENDANT: Yes.

25 THE COURT: Have you read it?

1 THE DEFENDANT: Yep.

2 THE COURT: Did you discuss it with Mr. Epstein?

3 THE DEFENDANT: Yes.

4 THE COURT: Did you tell him everything you know
5 about the case?

6 THE DEFENDANT: Yes.

7 THE COURT: Do you understand you're charged in
8 Count Three with participating in a conspiracy to distribute
9 and possess with intent to distribute at least 1 kilogram of
10 heroin?

11 THE DEFENDANT: Yes.

12 THE COURT: And do you understand you're charged in
13 Count Fourteen with brandishing a firearm during and in
14 relation to two different crimes; one is an assault and
15 attempted murder on December 11th, 2015, and the other is the
16 narcotics conspiracy charged in Count Three?

17 THE DEFENDANT: Yes.

18 THE COURT: Ms. Kelly, what are the elements of those
19 offenses?

20 MR. EPSTEIN: Your Honor, just to clarify,
21 Mr. Frazier will be pleading guilty to a lesser included of the
22 narcotics count. There won't be any specified weight.

23 THE COURT: Oh, I'm sorry, I misread. So Count Three
24 as indicted charges at least a kilo of heroin, but the
25 defendant's going to be pleading to just participating in a

1 conspiracy to distribute a quantity of heroin.

2 MR. EPSTEIN: Correct.

3 THE COURT: And Count Fourteen charges discharge but
4 the defendant will be pleading to brandishing.

5 MR. EPSTEIN: Yes.

6 THE COURT: Thank you for pointing that out.

7 Ms. Kelly, the elements of Count One.

8 MS. KELLY: Yes, your Honor.

9 THE COURT: I mean, Count Three.

10 MS. KELLY: And these are the elements as to what the
11 defendant will be pleading to.

12 As to Count Three, the government would have to prove
13 the following three elements:

14 First, that an agreement or understanding to commit
15 an offense against the United States, here to violate 21 United
16 States Code, Section 841, existed between two or more persons;

17 Second, that the defendant knowingly became a member
18 of the charged conspiracy; and

19 Third, that the controlled substance that the
20 defendant conspired to distribute and possess with intent to
21 distribute was heroin.

22 As to Count Fourteen, the government would have to
23 prove each of the following elements beyond a reasonable doubt:

24 First, that on or about December 11th, 2015, the
25 defendant used or carried or possessed a firearm;

1 Second, that the defendant used or carried the
2 firearm during and in relation to a crime of violence,
3 specifically an attempted murder, for the purpose of
4 maintaining and increasing the defendant's position in an
5 enterprise engaged in racketeering activity in the vicinity of
6 South and Liberty Streets in Newburgh;

7 Third, that the defendant acted knowingly and
8 willfully; and

9 Fourth, that the firearm was brandished.

10 In order to prove that the defendant did this for the
11 purpose of maintaining and increasing his position in the
12 racketeering enterprise, the government would also have to
13 prove the existence of the racketeering enterprise.

14 Specifically, first, that the defendant knowingly
15 agreed to conduct or participate in the conduct of the affairs
16 of the charged enterprise through a pattern of racketeering
17 activity;

18 Second, that an enterprise was established;

19 Third, that the enterprise would be engaged in or its
20 activities would affect interstate or foreign commerce; and

21 Fourth, that the defendant was employed by or
22 associated with the enterprise.

23 Finally, as to both counts, the government would have
24 to prove by a preponderance of the evidence that venue is
25 proper in the Southern District of New York.

1 THE COURT: Count Fourteen has as its predicates both
2 the Violent Crime in Aid of Racketeering charged in Count Two
3 and the narcotics conspiracy charged in Count Three.

4 MS. KELLY: Yes, your Honor. As set forth in the
5 plea agreement, the government is accepting a guilty plea to
6 the offense of brandishing firearms during and in relation to
7 just the December 11th, 2015, assault with a dangerous weapon
8 and attempted murder.

9 THE COURT: Okay. Okay. Thank you.

10 Mr. Frazier, did you hear what the prosecutor said
11 about the elements of the crimes?

12 THE DEFENDANT: Yes, ma'am.

13 THE COURT: Do you understand if you chose not to
14 plead guilty, the government would have to prove each part or
15 element of each of the offenses beyond a reasonable doubt at
16 trial?

17 THE DEFENDANT: Yes.

18 THE COURT: All right. Now let's talk about the
19 possible penalties. And we'll start with Count Three. Do you
20 understand that -- that's the narcotic conspiracy. Do you
21 understand that that carries a maximum prison term of 20 years,
22 a maximum supervised release term of life, a maximum fine of
23 the greater of \$1 million or twice the gross gain from the
24 offense plus a mandatory \$100 special assessment?

25 THE DEFENDANT: Yes.

1 THE COURT: And do you understand that Count One not
2 only carries the maximum -- not Count One, I keep saying that.

3 Count Three not only carries the maximum sentence
4 which I just described but also carries a mandatory minimum
5 penalty of three years supervised release?

6 THE DEFENDANT: Yes.

7 THE COURT: So do you understand that means I must
8 sentence you to at least that minimum penalty unless there's an
9 exception to the mandatory minimum?

10 THE DEFENDANT: Yes.

11 THE COURT: Looking at the plea agreement, it doesn't
12 look like either side is expecting an exception to the
13 mandatory minimum --

14 MR. EPSTEIN: Your Honor, the mandatory minimum is
15 zero years. The only mandatory minimum is the three years
16 supervised release.

17 THE COURT: That's what we're talking about. I said
18 the only mandatory minimum on Count Three is three years
19 supervised release.

20 I can't go below that unless there's an exception; do
21 you understand that?

22 THE DEFENDANT: Yes, ma'am.

23 THE COURT: And it doesn't look like either party is
24 expecting an exception in your case.

25 So unless something changes, I have to give you at

1 least three years supervised release on Count Three, and I
2 could give you as much as life; do you understand that?

3 THE DEFENDANT: Uh-hum.

4 THE COURT: And in terms of prison, on Count Three
5 it's anywhere from zero to 20 years.

6 THE DEFENDANT: Okay.

7 THE COURT: And do you understand that Count Four --
8 excuse me, Count Fourteen, carries a maximum sentence of life
9 imprisonment, a maximum term of supervised release of five
10 years, a maximum fine of the greater of \$250,000 or twice the
11 gross gain from the offense plus a mandatory \$100 special
12 assessment?

13 THE DEFENDANT: Yes. Sorry.

14 THE COURT: Yes, you have to say it out loud.

15 And do you understand that Count Fourteen also
16 carries a mandatory minimum sentence of seven years
17 imprisonment, which must run consecutively to any other
18 sentence?

19 THE DEFENDANT: Yes.

20 THE COURT: So, again, unless there's an exception to
21 the mandatory minimum, I have to give you at least seven years
22 imprisonment on Count Fourteen and that has to run after
23 whatever sentence I give you on Count Three; do you understand
24 that?

25 THE DEFENDANT: Yes, ma'am.

1 THE COURT: And again, it doesn't look like either
2 side's expecting an exception. So unless something changes, I
3 have to give you at least seven years on Count Fourteen; do you
4 understand that?

5 THE DEFENDANT: Yes.

6 THE COURT: And you understand that whatever
7 sentence -- well, let me ask it a different way.

8 You're pleading guilty to two different counts in the
9 indictment. Do you understand that I'm going to impose a
10 separate sentence on each count?

11 THE DEFENDANT: Yes.

12 THE COURT: Do you understand that the sentences have
13 to run consecutively, meaning you'll serve one after the other?

14 THE DEFENDANT: Yes.

15 THE COURT: And do you understand that the total
16 maximum possible sentence is life imprisonment with a mandatory
17 minimum of seven years?

18 THE DEFENDANT: Yes.

19 THE COURT: Now I've mentioned supervised release.
20 Do you understand that supervised release refers to a period of
21 monitoring and supervision following a prison term?

22 THE DEFENDANT: Yes.

23 THE COURT: There are terms and conditions of
24 supervised release with which you must comply, and if you do
25 not comply with them, you could be returned to prison without a

1 jury trial; do you understand that?

2 THE DEFENDANT: Yes.

3 THE COURT: Do you understand that if you violate the
4 terms or conditions of supervised release and are returned to
5 prison, the new prison term could be for part or all of the
6 term of supervised release and you would not get credit for
7 time previously served on your sentence or for time previously
8 served on supervised release?

9 THE DEFENDANT: Yes.

10 THE COURT: Do you also understand as part of your
11 sentence I can order you to make restitution to any person
12 injured as a result of your criminal conduct?

13 THE DEFENDANT: Yes.

14 THE COURT: Are you a United States citizen?

15 THE DEFENDANT: Yes.

16 THE COURT: Do you understand that your guilty plea
17 may deprive you of valuable civil rights such as the right to
18 vote, the right to hold public office, the right to serve on a
19 jury, the right to hold certain professional licenses and the
20 right to possess any kind of firearm?

21 THE DEFENDANT: Yes.

22 THE COURT: Do you understand there are sentencing
23 guidelines that I must consider in determining the appropriate
24 sentence in your case?

25 THE DEFENDANT: Yes.

1 THE COURT: Have you talked to Mr. Epstein about the
2 guidelines?

3 THE DEFENDANT: Yes.

4 THE COURT: Do you understand that I will not be able
5 to determine the relevant sentencing guidelines range for your
6 case until after a presentence report has been completed by the
7 probation office and you and the government have had the chance
8 to challenge any of the facts reported by the probation office?

9 THE DEFENDANT: Yes.

10 THE COURT: Do you further understand that even after
11 I determine what guidelines range applies to your case, the
12 guidelines provide me with the ability to depart from the range
13 calculated under the guidelines and to impose a sentence that
14 is above or below that range?

15 THE DEFENDANT: Yes.

16 THE COURT: After I determine the appropriate
17 guideline range and after I determine whether under the
18 guidelines an upward or downward departure from the range is
19 called for, I'll then determine the proper sentence in your
20 case having in mind not only the sentencing guidelines but also
21 each of the factors set forth in Title 18, United States Code,
22 Section 3553(a), a statute that requires me to take into
23 account a number of factors in addition to the sentencing
24 guidelines in considering the appropriate sentence for your
25 case; do you understand that?

1 THE DEFENDANT: Could you explain that?

2 THE COURT: Want me to say it again?

3 THE DEFENDANT: Yes, please.

4 THE COURT: No problem.

5 After I determine the appropriate guideline range and
6 after I determine whether under the guidelines an upward or
7 downward departure from the range is called for, I'll then
8 determine the proper sentence in your case having in mind not
9 only the guidelines but also each of the factors set forth in
10 Title 18, US Code, Section 3553(a), which is a law that
11 requires me to take into account a number of factors in
12 addition to the sentencing guidelines in considering the
13 appropriate sentence for your case.

14 THE DEFENDANT: Yes, I understand.

15 THE COURT: You understand that?

16 THE DEFENDANT: Yes.

17 THE COURT: So even after I determine the guidelines
18 range for your case, I must also consider these other factors,
19 and I might settle on a sentence higher or lower than what the
20 guidelines recommend; do you understand that?

21 THE DEFENDANT: Yes.

22 THE COURT: Do you understand there's no parole in
23 the federal system and you will not be released early on
24 parole?

25 THE DEFENDANT: Yes.

1 THE COURT: Do you understand if anyone has attempted
2 to estimate or predict what your sentence will be, their
3 estimate or prediction could be wrong?

4 THE DEFENDANT: Yes.

5 THE COURT: Nobody, not even your lawyer or the
6 Government's lawyer, can or should give you any assurance as to
7 what your sentence will be. I'm going to decide your sentence
8 and I'm not going to do that now. I can't do it until after
9 the probation office completes the presentence report, and I've
10 ruled on any challenges to the report, calculated the
11 guidelines range, determined whether there are grounds to
12 depart up or down from that range, and considered all the
13 statutory factors.

14 So nobody, not even I can predict what I'm going to
15 decide down the road to be the appropriate sentence in your
16 case; do you understand all that?

17 THE DEFENDANT: Yes, ma'am.

18 THE COURT: Do you also understand that if your
19 sentence is different from what your lawyer or anyone else told
20 you it might be or if it's different from what you expect or if
21 it's different from what's contained in your plea agreement
22 with the government, you will still be bound by your guilty
23 plea and you will not be allowed to withdraw your guilty plea?

24 THE DEFENDANT: Yes.

25 THE COURT: I've been given an original plea

1 agreement. I'm going to mark it as Court Exhibit 1.

2 Is that your signature on the last page?

3 THE DEFENDANT: Yes.

4 THE COURT: Did you read the agreement before you
5 signed it?

6 THE DEFENDANT: Yes.

7 THE COURT: Did you discuss it with Mr. Epstein
8 before you signed it?

9 THE DEFENDANT: Yes.

10 THE COURT: Did you discuss everything in it?

11 THE DEFENDANT: Yes.

12 THE COURT: Do you fully understand the agreement?

13 THE DEFENDANT: Yes.

14 THE COURT: Mr. Epstein, do you believe your client
15 fully understands the agreement?

16 THE DEFENDANT: Yes.

17 THE COURT: Mr. Frazier, is this written agreement
18 the complete understanding between you and the government
19 concerning your case?

20 THE DEFENDANT: Yes.

21 THE COURT: Is there any promise, agreement,
22 understanding or deal that you have with the government that's
23 not written down in this agreement?

24 THE DEFENDANT: No.

25 THE COURT: Has anyone threatened you or forced you

1 or coerced you to plead guilty or to enter into the plea
2 agreement?

3 THE DEFENDANT: No.

4 THE COURT: Besides what's in the plea agreement, has
5 anyone promised you anything or offered you any inducements to
6 plead guilty or to enter into the plea agreement?

7 THE DEFENDANT: No.

8 THE COURT: Has anyone made a promise to you as to
9 what your sentence will be?

10 THE DEFENDANT: Nope.

11 THE COURT: Now I see in the plea agreement that you
12 and the government have reached agreements or stipulations
13 regarding the sentencing guidelines.

14 Do you understand that those stipulations regarding
15 the guidelines are binding on you and they're binding on the
16 government but they're not binding on me?

17 THE DEFENDANT: Yes.

18 THE COURT: I will of course consider what you and
19 the government have agreed to in the plea agreement, but I'll
20 be making my own determination of your guidelines range; do you
21 understand that?

22 THE DEFENDANT: Yes.

23 THE COURT: And do you understand that under the plea
24 agreement you're giving up your right to appeal or otherwise
25 attack or challenge the conviction and sentence as long as I

1 sentence you within or below the stipulated guidelines range of
2 135 to 147 months imprisonment?

3 THE DEFENDANT: Yes.

4 THE COURT: Mr. Epstein, do you know of a valid
5 defense that would prevail at trial or any reason why your
6 client should not be permitted to plead guilty?

7 THE DEFENDANT: No.

8 THE COURT: Do you believe there's an adequate
9 factual basis to support the plea?

10 MR. EPSTEIN: Yes.

11 THE COURT: Ms. Kelly, do you believe there's an
12 adequate factual basis to support the plea?

13 MS. KELLY: I do, your Honor.

14 THE COURT: Could you please summarize what the
15 government would prove if the case went to trial?

16 MS. KELLY: Yes. If the case were to proceed to
17 trial, the government would expect to prove with respect to
18 Count Three that from in or about at least 2014 through in or
19 about June 2017, the defendant sold heroin in Newburgh as part
20 of his membership in the Southside Gang, which was a violent
21 street gang that sold crack cocaine and heroin and used
22 violence, including shootings and robberies, to defend its drug
23 turf against other rival gang members, including members of a
24 rival Newburgh gang known as the Yellow Tape Money Gang or
25 YTMG.

1 The defendant regularly carried a gun in connection
2 with his drug dealing, and on one occasion sold a gun to a
3 confidential informant acting at the direction of law
4 enforcement.

5 The defendant also sold heroin on three occasions to
6 the confidential informant as part of controlled purchases.

7 With respect to Count Fourteen, the government would
8 expect to prove that on or about December 11, 2015, the
9 defendant was in the vicinity of South Street and Liberty
10 Street in Newburgh in the heart of Southside Gang territory
11 with Skylar Davis, a/k/a S-Dot, and other Southside members.
12 The defendant was carrying a firearm, which he showed off to a
13 cooperating witness.

14 While Frazier Davis and others were outside, a black
15 car driven by a rival YTMG gang member came down the street,
16 and another YTMG member began shooting at the Southside
17 members. Frazier and Davis pulled their guns, and Davis fired
18 back at the car.

19 An eyewitness described seeing multiple guns on their
20 side of the street; however, ballistics evidence collected at
21 the scene only proves that one gun matching the caliber carried
22 by Davis was fired.

23 The shots from Southside caused the YTMG car to crash
24 injuring all three members inside it. Following the incident,
25 YTMG member Gabriel Warren who was driving the car called out

1 Davis and Frazier on Facebook for the shooting and they liked
2 and commented on the post in response.

3 The defendant's membership in the Southside Gang
4 would be further corroborated by additional witness testimony
5 and Facebook posts by the defendant and other gang members.

6 The Government's other evidence as to Counts Three
7 and Fourteen would consist of, among other things: Law
8 enforcement testimony regarding the recovery of ballistics
9 evidence at the scene of the December 11th, 2015, shooting;
10 eyewitness and cooperator testimony regarding that shooting;
11 cooperator testimony and Facebook evidence from Frazier and
12 Southside members demonstrating the defendant's membership in
13 Southside, including a rap video the defendant posted on or
14 about May 15, 2017, in which he appears with other Southside
15 members, raps about dealing crack, being in the gang, and
16 carrying a gun to defend the gang. This video was also posted
17 by fellow gang members and co-defendants Ditavious Williams and
18 Paradise Branch.

19 Controlled purchases of heroin and a firearm from the
20 defendant and of crack cocaine and heroin from other Southside
21 members. Video and photo surveillance of those transactions
22 and wiretap evidence of wiretap of another Southside member's
23 phone, including numerous conversations between Southside
24 members about drug sales and gang-related shootings.

25 THE COURT: Thank you, Ms. Kelly.

1 Mr. Frazier, can you tell me in your own words or in
2 words you've agreed on with your lawyer, what you did that
3 makes you guilty.

4 THE DEFENDANT: Count Three, in 2017 I sold heroin in
5 Newburgh with other people; and to Count Fourteen, possessed
6 and brainished. In 2016 and '17 I was a part of a gang called
7 Southside. As part of the gang and to maintain my position in
8 the gang, I was present and brandished a firearm on
9 December 11, 2015. Yeah, 2015, when Southside intentionally
10 shot at gang members of a rival gang in Newburgh. In Newburgh.
11 This occurred in Newburgh.

12 THE COURT: Hold on, I think I didn't catch exactly
13 what you said about Count Fourteen; can you say that again?

14 THE DEFENDANT: In 2016 and '17, I was part of a gang
15 called Southside. As part of the gang and to maintain my
16 position in the gang, I was present and brandished a firearm on
17 December 11th, 2015, when Southside initially shot at members
18 of a rival gang in Newburgh.

19 MR. EPSTEIN: I think it was intentionally shot not
20 initially shot.

21 THE DEFENDANT: Intentionally shot.

22 THE COURT: The shooting was in December 2015. The
23 defendant said he was a member of Southside in 2016 and 2017.

24 MR. EPSTEIN: I think it was misspoken. It's 2015,
25 '16 and '17.

1 THE COURT: Let me ask Mr. Frazier. At this time of
2 this shooting on December 11th, '15, when the car crashed.

3 THE DEFENDANT: Uh-hum.

4 THE COURT: Were you a member of Southside at that
5 time?

6 THE DEFENDANT: Yes.

7 THE COURT: Okay. So you became a member of at least
8 as of 2015.

9 THE DEFENDANT: Yeah.

10 THE COURT: Okay. And Southside was a group of
11 people who associated together for, among other things, the
12 purpose of committing crimes together?

13 THE DEFENDANT: Yes.

14 THE COURT: And when you became a member, did you
15 understand that members of the gang were going to commit
16 multiple crimes?

17 THE DEFENDANT: Yes.

18 THE COURT: And when you -- and that did include
19 selling drugs?

20 THE DEFENDANT: Yes.

21 THE COURT: And you concede, Mr. Epstein, that the
22 government would be able to prove the interstate commerce
23 element?

24 MR. EPSTEIN: Yes.

25 THE COURT: And on this date, December 15, you were

1 part of a group of Southside members who had a confrontation
2 about YTMG?

3 THE DEFENDANT: Yes.

4 THE COURT: And somebody in Southside actually shot
5 at YTMG and vice versa?

6 THE DEFENDANT: Yes.

7 THE COURT: And as part of that you displayed a
8 firearm so that the other people would know you were armed and
9 could shoot?

10 THE DEFENDANT: Yes.

11 THE COURT: And did you also agree with other members
12 of Southside to -- well, it doesn't have to be with other
13 members of Southside.

14 Did you agree with other people to work together to
15 sell heroin?

16 THE DEFENDANT: Yes.

17 THE COURT: And this all took place in Newburgh?

18 THE DEFENDANT: Yes.

19 THE COURT: When you were doing these things, did you
20 know that what you were doing was wrong and illegal?

21 THE DEFENDANT: Yes.

22 THE COURT: Did anybody threaten or coerce you or
23 force you to do these things?

24 THE DEFENDANT: Nope.

25 THE COURT: And do you admit to the forfeiture

1 allegations with respect to Count Three and agree to forfeit
2 any proceeds of the drug conspiracy?

3 THE DEFENDANT: Yes. There is no proceeds.

4 MR. EPSTEIN: Your Honor.

5 THE COURT: There's no agreement on forfeiture;
6 correct?

7 MS. KELLY: No, your Honor.

8 THE COURT: And you're not in possession of any of
9 the proceeds?

10 THE DEFENDANT: No, ma'am.

11 THE COURT: Does either lawyer think I should ask any
12 further questions?

13 MS. KELLY: No, your Honor.

14 MR. EPSTEIN: No, your Honor.

15 THE COURT: All right, let me ask you now formally,
16 Mr. Frazier, how do you plead to the charge in Count Three of
17 indictment S4 17CR364 charging you with conspiracy to
18 distribute and possess with intent to distribute a quantity of
19 heroin, guilty or not guilty?

20 THE DEFENDANT: Guilty.

21 THE COURT: Are you, in fact, guilty that charge?

22 THE DEFENDANT: Yes, ma'am.

23 THE COURT: Are you pleading guilty voluntary and of
24 your own free will?

25 THE DEFENDANT: Yes.

1 THE COURT: And how do you plead to the charge in
2 Count Fourteen charging you with brandishing a firearm during
3 and in relation to a December 11th, 2015, assault with a
4 dangerous weapon and attempted murder, guilty or not guilty?

5 THE DEFENDANT: Guilty.

6 THE COURT: Are you, in fact, guilty of that charge?

7 THE DEFENDANT: Yes.

8 THE COURT: Are you pleading guilty voluntarily and
9 of your own free will?

10 THE DEFENDANT: Yeah.

11 THE COURT: You sound like you're not sure.

12 THE DEFENDANT: Yeah, I'm guilty.

13 THE COURT: You're pleading guilty voluntarily and of
14 your own free will?

15 THE DEFENDANT: Yes.

16 THE COURT: Nobody's coerced you or threatened you or
17 forced you to plead guilty?

18 THE DEFENDANT: No.

19 THE COURT: Because you acknowledge that you're
20 guilty of the lesser included offenses of Count Three and Count
21 Fourteen, because I find you know your rights and are waiving
22 them voluntarily with the understanding of the consequences of
23 your plea, including the potential sentences that may be
24 imposed, and because I find your plea is entered knowingly and
25 voluntarily and is supported by an independent basis in fact

1 containing each of the essential elements of the offense, I
2 accept your guilty plea and adjudge you guilty of those
3 offenses.

4 As I mentioned, the probation office is going to
5 prepare a presentence report to assist me in sentencing you.
6 You'll be interviewed by probation in connection with that
7 report. You can and should have Mr. Epstein with you during
8 that interview. If you say anything to probation, it's
9 important that the information you give be truthful and
10 accurate. The report's going to be important in my decision as
11 to what your sentence will be.

12 You and Mr. Epstein have the right and will have the
13 opportunity to study the report, to challenge it, and to
14 comment on it before I sentence you, so it's important that
15 when the presentence report is issued, you read it over
16 carefully and you discuss it in detail with Mr. Epstein before
17 your sentencing date. If there are any mistakes, inaccuracies
18 or other issues in the report, make sure you point them out to
19 him so that he can point them out to me before I sentence you,
20 and you and he will also both have the right to speak on your
21 behalf before I impose the sentence. And the date for that
22 will be...

23 THE CLERK: January 18th, 2019, at 10:00 a.m.

24 MR. EPSTEIN: Your Honor, I think I'd prefer a date
25 of February. I'm starting a trial in front of Judge Pauley in

1 the middle of January, which should go on for at least a month.
2 Realistically on the 18th of January I will be deep into
3 reading 3500 material.

4 THE COURT: So we're already in the second half of
5 October. So let's go into February.

6 What's the date for that trial?

7 MR. EPSTEIN: It's supposed to end on February 15th.

8 THE COURT: Second half of February?

9 MR. EPSTEIN: Yes.

10 THE CLERK: February 26th, 2019 at 3:30 p.m.

11 MR. EPSTEIN: That's fine, your Honor. Thank you.

12 THE COURT: If that trial goes, I'm going to sit full
13 days, but I don't think it's going to go. So we'll live
14 dangerously, let's leave it where it is. February 26th at
15 3:30.

16 Mr. Epstein, can you touch base with probation the
17 next couple of days and make sure that interview occurs in the
18 next month?

19 MR. EPSTEIN: Yes.

20 THE COURT: And Ms. Kelly, can you make sure the
21 probation gets the prosecution summary within the next couple
22 of weeks?

23 MS. KELLY: Yes, your Honor.

24 THE COURT: Can both sides remember to send hard
25 copies of your sentencing submissions to chambers?

1 MR. EPSTEIN: Yes, your Honor.

2 MS. KELLY: Yes, your Honor.

3 THE COURT: I'm going to return Court Exhibit 1 to
4 the government for safekeeping.

5 Anything else we should do this afternoon?

6 MR. EPSTEIN: No, your Honor.

7 MS. KELLY: No, your Honor. Thank you.

8 THE COURT: Thank you all.

9 MR. EPSTEIN: Thank you very much.

10 (Proceeding concluded)

11 CERTIFICATE: I hereby certify that the foregoing is a true and
12 accurate transcript, to the best of my skill and ability, from
my stenographic notes of this proceeding.

13 -----
Angela A. O'Donnell, RPR, Official Court Reporter, USDC, SDNY

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EXHIBIT D

190402frazierS Sentence

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

-----x

3 UNITED STATES OF AMERICA

4 v.

17 Cr. 00364 CS

5 DIAMANTE FRAZIER,

6 Defendant.

7 -----x

8 United States Courthouse
9 White Plains, N.Y.
April 2, 2019
10:05 a.m.

10 Before:

11 THE HONORABLE CATHY SEIBEL,

12 District Judge

13
14 APPEARANCES

15 GEOFFREY S. BERMAN

16 United States Attorney for the
Southern District of New York

17 ALLISON NICHOLS

Assistant United States Attorney

18 LLOYD EPSTEIN

19 Attorney for Defendant Diamante Frazier

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1 (In open court)

2 THE DEPUTY CLERK: In the matter of the United States
3 v. Diamante Frazier.

4 THE COURT: Good morning, Ms. Nichols, Mr. Epstein,
5 and Mr. Frazier. You can all have a seat.

6 Let me start by putting on the record what I've
7 received in connection with sentencing. I have a presentence
8 report, which is dated January 10. I have Mr. Epstein's
9 memorandum, with attachments, dated February 5. I have a
10 letter that came directly to chambers from somebody named
11 George Frazier on the letterhead of Hoops Express, Inc.

12 I don't remember if the parties received this.

13 MS. NICHOLS: I haven't received it, your Honor.

14 MR. EPSTEIN: I have not.

15 THE COURT: I think it just came. No, actually, it
16 came a while ago. I don't know why we didn't share it with
17 you, but I'll do that right now.

18 I also have the government's letter of February 20,
19 and Mr. Epstein's supplemental submission of yesterday.

20 Is that everything I should have?

21 MR. EPSTEIN: As far as I know, yes.

22 MS. NICHOLS: Yes, your Honor.

23 THE COURT: I'll give you guys a moment to look at
24 that letter.

25 (Pause)

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1 THE COURT: Now, there is one error that the parties
2 agree need to be fixed in the presentence report, and that is
3 on page 29. I'm going to strike "Frazier shot at a car."
4 Actually, I'll change it to "Frazier's companion shot at a
5 car."

6 MS. NICHOLS: Perhaps "co-conspirator," your Honor, or
7 "co-defendant"?

8 THE COURT: "Co-defendant." That makes it clear.

9 Mr. Frazier, have you read the presentence report?

10 THE DEFENDANT: Yes, your Honor.

11 THE COURT: Have you gone over it with your lawyer?

12 THE DEFENDANT: Yes, your Honor.

13 THE COURT: Mr. Epstein, have you read the report and
14 gone over it with your client?

15 MR. EPSTEIN: Yes.

16 THE COURT: And apart from that one issue on page 29,
17 do you have objections to the factual material in the
18 presentence report?

19 MR. EPSTEIN: No, your Honor.

20 THE COURT: Does the government have objections to the
21 factual material in the presentence report?

22 MS. NICHOLS: No, your Honor.

23 THE COURT: All right. Then, with that one
24 correction, the findings of fact in the presentence report are
25 my findings of fact.

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1 Does the government wish to be heard?

2 MS. NICHOLS: Just briefly, your Honor. The Court, I
3 know, is very familiar with this case and has sentenced several
4 of the defendant's co-defendants so far.

5 In short, the defendant's conduct here was not the
6 result of a momentary lapse of judgment, but it was the result
7 of a year's long participation in a violent street gang that
8 engaged in multiple reciprocal retaliatory acts of violence
9 with the other gang that lived just about a mile down the road
10 in Newburgh. He was also involved in drug dealing for a number
11 of years, and he was carrying guns with his drug dealing. And
12 in one instance, he sold a gun, along with drugs, to a
13 confidential informant.

14 The government, of course, recognizes that
15 Mr. Frazier's criminal history is less than some of his
16 co-defendants, and that's certainly important for the Court to
17 consider here, but I think that what we do know about his
18 criminal activity and his experiences with the Criminal Justice
19 System so far indicate a troubling trajectory towards greater
20 and more serious conduct, more violent conduct. And so far,
21 that has not deterred him from continuing down that path.

22 He expresses in his letter remorse and some gratitude
23 that things didn't become worse than they were, and that's also
24 to his credit, but the guidelines here are serious and high,
25 and appropriately so. So the government is seeking a guideline

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1 sentence in this case.

2 With respect to Mr. Frazier's familial support, that
3 is, of course, also important to consider. There were a number
4 of letters speaking to his character. Some of the people who
5 wrote these letters, with all respect to them, appear to have
6 less familiarity with the case. And to refer to this as a
7 momentary lapse in judgment, just to underline something in the
8 government's letter, frankly, the idea that Mr. Frazier's
9 fiancée had no idea what was happening when he was dealing
10 drugs out of the apartment that he shared with her is, frankly,
11 not credible.

12 So, the 3553(a) factors, as they often do, sort of cut
13 in two directions. And the family support that he apparently
14 enjoys has not been sufficient in the past to prevent him from
15 continuing to engage in this kind of criminal activity.

16 And just the last thing that I'll say, your Honor, is
17 that in addition to the specific acts that Mr. Frazier
18 participated in, including the shooting that happened mid-day,
19 just on a regular residential street where he brandished a
20 firearm and at least his co-defendant shot at the car that then
21 crashed into a tree, in addition to these specific acts of
22 violence and specific instances of drug-dealing, Mr. Frazier
23 bears responsibility for certain atmospheric escalations of the
24 gang warfare here.

25 He was one of Southside's leading rappers, and that

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1 may seem like a silly thing to say, but we know from the way
2 that this warfare perpetuated between these two gangs that this
3 kind of online posturing, the Facebook posts, and the rap
4 videos and the taunting of gang rivals over the Internet had a
5 very real and tangible effect that created and led to and
6 heightened the violence between the two gangs, and Mr. Frazier
7 was, frankly, in the thick of that.

8 So, for all of those reasons, the government
9 respectfully submits that a guideline sentence is appropriate
10 here.

11 THE COURT: Thank you, Ms. Nichols.

12 Mr. Epstein.

13 MR. EPSTEIN: Thank you, your Honor.

14 We're obviously asking for a sentence below the
15 guidelines, but it's important to remember that even the
16 minimal sentence in this case will be a relatively severe
17 sentence, more than seven years, for a young man who has never
18 served a significant jail sentence before.

19 And to the extent that the punishment is meant to
20 instill a sense of deterrence, I don't think there's any
21 question that seven years in federal custody will have that
22 effect, and that that effect will not be substantially
23 different than a sentence of eight, nine or ten years in jail.

24 When I first met Mr. Frazier, I immediately realized
25 that I was dealing with somebody who was much more complex than

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1 many of the clients that I ordinarily deal with.

2 Very, very early on in the case, he sent me a letter
3 with a case that discussed whether selling drugs and a gun
4 together was sufficient to prove using a gun during a drug
5 transaction. Now, we all know that as the law has developed,
6 it's the case that that is sufficient, but that was not always
7 a clear and decided question.

8 And what impressed me about him when I spoke to him
9 about it is how bright and analytical his mind was. He made
10 all of the mistakes that a first-year law student made. He
11 didn't know how to Shepardize the case. He didn't know the
12 difference between the Western District of Carolina and the
13 Second Circuit, but he showed a level of intelligence, which I
14 thought was much more than many people that I encounter.

15 At the same time, he showed an extraordinary level of
16 immaturity. When I first started talking to him about what
17 programs he would get involved with - and he was in Valhalla,
18 not at the MDC or the MCC - the conversation always turned to
19 the jail basketball tournament and which of the federal prisons
20 had the best basketball team. It was a way of completely
21 misunderstanding the situation, the seriousness of what he was
22 in. And what always struck me was really the conflict between
23 someone who was very, very intelligent and somebody, who, in
24 some sense, seemed very immature.

25 There came a point in which this shifted, that

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1 Ms. Ramdeen - his fiancée who is in the courtroom with his
2 mother, his future sister-in-law, who also wrote a letter to
3 the Court and other family relatives - she described the time
4 that he started talking about getting his CDL, a commercial
5 driver's license. When I received that letter, I was struck
6 because I had the same conversation with him. He started
7 talking to me about what he was going to be doing six or seven
8 years down the line.

9 And he started taking the courses at Valhalla, which,
10 frankly, are not the same types of things that are offered at
11 the MDC, MCC. And I think that, to his credit, he pursued
12 everything that he could. I think it's important to remember
13 that the atmosphere in Valhalla is not the same as the MCC or
14 MDC.

15 Certain things everyone in the city knows. Every
16 prisoner knows that if you get a lot of certificates, you
17 present them to the judge, and maybe that will help you get a
18 reduced sentence. It's not the atmosphere in Valhalla. It's a
19 completely different world there. And to Mr. Frazier's credit,
20 he pursued it.

21 I want to talk a little bit about why there's good
22 reason to believe that Mr. Frazier is not going to be involved
23 in further criminal activity. I think that the factual
24 objection that we made, which the Court just made, is more
25 significant, or at least is very significant, more significant

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1 than many factual changes that are made; that when people are
2 involved in crimes, there are various gradations; that it takes
3 a certain mentality to possess a gun, a certain mentality to
4 brandish a gun, but it takes something completely different to
5 shoot a gun.

6 And there was a moment where Mr. Frazier was in the
7 car with Skylar Davis, and Skylar Davis shot the gun.
8 Mr. Frazier held the gun, he brandished it, but it was a moment
9 of truth in which the element of his conscience or his basic
10 decency came to the fore and he didn't shoot the gun.

11 Now, I'm not in any way suggesting this makes him a
12 hero or somebody that people should look up to, but when the
13 Court is considering the difference between a seven-year
14 sentence versus an eight- or nine-year sentence, I think it
15 does tell us something about Mr. Frazier's basic character.

16 I also think, your Honor, that the fact that his
17 fiancée and her family are willing to wait for Mr. Frazier
18 tells you a lot about Mr. Frazier, and something about them. I
19 spent a lot of time during the last two years talking to
20 Ms. Ramdeen. I found it was easier than going to Valhalla all
21 the time as a way of getting more information about
22 Mr. Frazier. And frankly, even when she told me she was going
23 to marry Mr. Frazier, I was still somewhat sceptical. Was this
24 a bright-eyed, open-eyed, dreamy-eyed young woman, or was it
25 somebody who was really grounded in reality?

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1 So I asked her, what does the rest of her family think
2 about this. And we talked about her father who works in
3 accounting, who is a very, very upstanding citizen, and he
4 wrote me a letter saying that he has confidence in Mr. Frazier,
5 as well. Her sister has confidence in Mr. Frazier. And I
6 think that should give the Court some measure of confidence
7 that things will work out for Mr. Frazier, along with, of
8 course, the stated ambitions that he has -- that he has
9 expressed.

10 Finally, your Honor, the government makes an argument
11 that the family's view and Ms. Ramdeen's view should be
12 discounted because they were not able to prevent Mr. Frazier
13 from getting involved in criminal activity, and it's a fairly
14 faulty argument. I think we all know that people are very
15 complex, and when young people are in love, they tend to see
16 everything that is good and try to rationalize what's bad.

17 And I think the idea that now the situation hasn't
18 changed, now that Mr. Frazier is going to spend at least seven
19 years in prison is, frankly, ridiculous. It's something that
20 has an impact on Mr. Frazier, it has an impact on the family,
21 and I think all of this bodes well for the future.

22 Finally, your Honor, we're talking about a relatively
23 small range of possible sentences. Realistically, we're
24 talking about something going from seven years to something at
25 the top of the guidelines is 11 years. But what I suggest,

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1 your Honor, is that the impact on Mr. Frazier and on his
2 family, and the possibility of his becoming an upstanding
3 citizen, is much greater, the additional two years or three
4 years will have a much greater negative impact on him than the
5 positive impact of getting the word on the street that if you
6 belong to a gang, you're going to get a significant sentence.

7 Everybody will know that Mr. Frazier has gotten a
8 sentence of at least seven years here in this case, no matter
9 what the Court decides, which is a highly significant sentence
10 for somebody whose previous criminal record involved relatively
11 not serious misdemeanors.

12 THE COURT: Let me just interrupt you on the math.

13 The high end of the range by my count is almost 12
14 years. I come out to 130 is the low end, which is almost 11
15 years; and 141 is the high end, which is almost 12.

16 MR. EPSTEIN: I think we agree on the numbers.

17 THE COURT: 46 to 57, plus 84.

18 MR. EPSTEIN: Plus 84. Correct, your Honor.

19 THE COURT: So, we're between the high end of the
20 range and the mandatory minimum is 84, and the high end is 141.

21 MR. EPSTEIN: I think we agree on the numbers, your
22 Honor.

23 THE COURT: Okay.

24 MR. EPSTEIN: I think that is clear.

25 Under any circumstances, your Honor, the difference

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1 between a sentence close to 12 years as opposed to a sentence
2 of close to seven years, I think will have a minimal impact in
3 getting the word on the street, but it will have an
4 unnecessarily negative impact on Mr. Frazier and on his family.
5 Therefore, I'm asking the Court to impose a sentence very, very
6 close to the mandatory minimum.

7 THE COURT: Thank you, Mr. Epstein.

8 Mr. Frazier, if there's anything you'd like to say,
9 I'll hear you now.

10 MR. EPSTEIN: Your Honor, should he stand up or sit?

11 THE COURT: It's all right with me if you want to sit.
12 Just pull the mic. so that it's in front of you.

13 THE DEFENDANT: Your Honor, I would like to apologize
14 to my community for the guns that I sold. I realize how
15 serious firearms can be when anybody possesses them. I would
16 also like to apologize for the drugs I sold.

17 Looking back, I realize how selfish, stupid and lazy I
18 was. I only thought about how quick I could make money and not
19 the impact drugs had on people's lives. I let a lot of people
20 down who invested in me because of what I associated myself
21 with.

22 God has opened my eyes up to so many things during
23 this journey, and I'm truly blessed to be the person I am
24 today. I'm no longer afraid to grow up and change the mindset
25 that a lot of people from my community have.

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1 And 22 months ago, when I first was in your courtroom,
2 I'm not the same person as I am today due to the circumstances
3 I'm facing.

4 I have no intentions on being in a group nor on the
5 streets when I get home. I would like to thank my mother and
6 fiancée for sticking by me during this time. And they
7 motivated me to use the experience as a wake-up call, and I
8 vowed to them to never let them down again after this. And
9 this is something I never wanted to put them through or myself
10 through again, and this is the last time I'll be in anyone's
11 courtroom.

12 Thank you.

13 THE COURT: Thank you.

14 I have to start with the Sentencing Guidelines. They
15 are only advisory, but they're a starting point. They only
16 require a calculation for the drug count because there's a
17 mandatory minimum of seven years consecutive on the gun count.

18 The basis offense level for the drug count is 24. Two
19 levels are added because the defendant possessed a firearm in
20 connection with the narcotics conspiracy. The 924(c) count is
21 related to an assault, so it doesn't preclude the application
22 of the two levels to the drug count, so the adjusted offense
23 level is 26. Three levels are subtracted for the defendant's
24 timely acceptance of responsibility. And the adjusted offense
25 level is 23.

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1 The defendant has two prior convictions: one is a drug
2 misdemeanor from 2016, where he got probation, despite having
3 50 bags of heroin on him and fleeing from the police; however,
4 he violated his probation, and that was revoked, and he served
5 90 days. Ordinarily, that would result in two criminal history
6 points, but, because it was part of the offense of conviction,
7 it doesn't result in any criminal history points.

8 And he has a conviction for a false personation. When
9 he was caught with several bags of weed, he gave a false name.
10 That resulted in a conditional discharge; also, no criminal
11 history points. It's not clear whether he's going to be
12 violated based on the instant conduct.

13 He has no criminal history points. He's in Criminal
14 History Category I. And the sentencing range for the drug
15 count is 46 to 57. When you add in the mandatory seven
16 consecutive, the guidelines range is 130 to 141 months.

17 Probation is recommending the low end of that range,
18 130 months, which is seven and-a-half years -- no, ten years
19 and ten months. It's almost 11 years.

20 Whether I should sentence within, above or below that
21 range turns on the 3553(a) factors. The first is the nature
22 and circumstances of the offense. This is an extremely serious
23 offense. I have had far too many occasions to say this,
24 dealing drugs is bad enough, but doing it as part of a violent
25 gang is so much worse.

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1 This defendant not only did his drug dealing in
2 coordination with a violent gang, therefore, capitalized on its
3 reputation, but he was a big part of why it had that
4 reputation.

5 He was not what we sometimes see, which is somebody
6 who is just an opportunist and takes advantage of the fact that
7 he can align himself with a gang to make more money as a drug
8 dealer.

9 This defendant, from what I can tell, loved being in
10 the gang, boasted about it, bragged about it, enjoyed the
11 ratcheting up of the rivalry with the other gang, didn't think
12 twice about the violence, toted a gun, even sold one, and
13 didn't give any thought to the danger he was putting himself in
14 or the danger he was bringing on his community. So, it would
15 be an extremely serious offense even if the defendant were not
16 involved in the encounter, I'll say, with YTMG in which he
17 didn't fire his gun, thank God, thank God, but he brandished
18 his gun during a shootout. And it's just dumb luck that he
19 didn't -- that nobody got killed, either in the other car from
20 the other gang or just walking on the street. If that were the
21 case, we wouldn't be talking about, Well, should it be 7 or 10
22 or 12, we'd be talking about should it be 25 or 30 or life?
23 And that is just pure luck.

24 And the defendant did not regard this as a close call
25 or a wake-up call or say, Wow, thank God nobody got killed, I

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1 need to change my life. Instead, he boasted about the rivalry
2 and continued to ratchet it up online.

3 Dealing drugs is bad. Dealing drugs with a gun is
4 bad. Dealing drugs as part of a violent gang is bad. And
5 being an enthusiastic member who glorifies the violence of that
6 gang is bad, so this is a bad offense.

7 The history and characteristics of the defendant, we
8 have some positives. I have letters from people who think
9 Mr. Frazier is a good guy. I cannot imagine that they are so
10 ignorant of what he's been doing with his life that they
11 weren't fully aware that he was dealing drugs and a member of
12 Southside. I don't see how one could bury one's head in the
13 sand that deep. You've got to start wondering when the person
14 you're talking about doesn't work, and has money, and hangs out
15 on the street, and you know who his friends are. Obviously,
16 everybody knew what Mr. Frazier was up to. So, the fact that
17 they're still behind him could mean that they're completely
18 amoral people, but I don't think that's what it means. I think
19 what it means is that there's some good in him, and that's to
20 his credit. Also to his credit is what he said today and in
21 his letter, where he seems to have some insight that he didn't
22 have up until the time he got arrested.

23 Almost all of the other factors that we look at do not
24 bode as well. The defendant graduated the high school but then
25 never did anything with his life. He enrolled in Orange

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1 Community College, but he earned almost no credits. And he has
2 worked minimally on temporary jobs, which he doesn't even hold.
3 And it's clear to me he was making his living dealing drugs.

4 He had challenges in his childhood, no doubt. His
5 father set a really bad example. And even though his mother
6 worked, they were in a neighborhood where drugs and guns and
7 violence were rampant; although, he didn't experience any abuse
8 in his home, and his basic needs were met.

9 There was a time where Child Protective Services was
10 involved, but the presentence report wasn't able to track down
11 what was going on there, except that, happily, the defendant
12 was treated well during his time in foster care and then went
13 to live with his grandmother who he also liked living with, and
14 he eventually came back here to live with his mother. So, all
15 of that could not have been easy.

16 And he also had some struggles in school, but he
17 managed to graduate, and he was not accused or neglected as far
18 as I can tell, like so many defendants who I see here are. He
19 basically got high all day, every day, and when he had
20 treatment, he flunked out. Well, he got arrested, so he didn't
21 complete the program, but he was not abstaining during the
22 program.

23 So, what we have I think is a picture of somebody who
24 everybody around him knew was committing crimes and getting
25 high and doing some very antisocial and dangerous and

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1 destructive things.

2 According to the government, he was dealing drugs out
3 of the apartment where his fiancée lived, putting her in
4 jeopardy. She and her family should be grateful that she's not
5 a co-defendant. So, it does leave you wondering why are they
6 sticking by this man. He put not just their whole community in
7 danger, but their loved ones in danger.

8 Just by being a member of this gang, walking down the
9 street next to Mr. Frazier, you're in danger because he's
10 taunting the other gang and he's inviting violence against
11 himself. And so, literally, just walking down the street with
12 him, you're in danger, but when he's committing crimes out of
13 your home, you're really in danger. They see something in him,
14 notwithstanding that they have every reason to leave him
15 behind.

16 And although they absolutely must have known what he
17 was up to and were ineffective in getting him to stop, if they
18 tried to get him to stop, he does seem to feel remorse for what
19 he's putting them through, or at least he's grateful that he
20 hasn't been dumped, which is to his credit.

21 I have to consider the need for the sentence imposed
22 to reflect the seriousness of the offense. I've already talked
23 about that.

24 I have to consider promoting respect for the law. I
25 hope that that has occurred since the defendant is looking at a

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1 significant sentence.

2 I have to consider deterrence, not just Mr. Frazier,
3 but people in the community. And they know who the crazy,
4 violent shooters are, and they know who the sort of low-level,
5 marginally involved people are, and they know who the
6 enthusiastic members are. And they need to see that the
7 enthusiastic members get more time than the minor players and
8 less time than the active shooters, so I do take that into
9 account here.

10 Protecting the public is an issue, given the danger --
11 given the nature of the offenses and the fact that the
12 defendant, after getting a break after his first arrest,
13 continued - and after his second - both times, while under a
14 Criminal Justice Sentence, continued committing crimes.

15 I have to consider the guidelines and the need to
16 avoid unwarranted disparities. I have considered all of the
17 3553(a) factors, even the ones I haven't specifically
18 discussed.

19 The guidelines range here is completely reasonable;
20 one could argue even a higher sentence than that for this
21 conduct would be reasonable. But what's reasonable is not the
22 question. The question is, what's the lowest sentence I can
23 impose that is sufficient to serve the purposes of sentencing
24 without being greater than necessary.

25 Largely because he seems to have shown some insight

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1 and because I want to encourage that, I'm going to go below the
2 guidelines, but not nearly as much as Mr. Epstein has
3 suggested. This conduct is just too serious, too lengthy, and
4 too destructive for me to go as low as the defendant suggests.
5 But I do feel that this defendant, given his intelligence and
6 the insight that he seems to be showing, does have the ability
7 to straighten out his life.

8 So, I'm going to go below the recommended sentence and
9 impose a total sentence of 120 months, which will be 84 months
10 on Count Two, to run consecutive to 38 months on Count One.

11 Actually, I think I might have the count numbers
12 wrong. Count Three will be 38 months. Wait. My math is
13 wrong. It's 36 months. It's 36 months on Count Three, to be
14 followed by 84 months on Count Fourteen, to run consecutive for
15 a total of 120 months. And that's going to be followed by
16 three years of supervised release on Count Three and four years
17 supervised release on Count Four, to run concurrent for a total
18 of four years.

19 Supervised release will be on the following
20 conditions. And I know probation is recommending five, but I
21 think four will be enough for us to know whether Mr. Frazier is
22 on the right track or not. The following conditions are
23 mandatory. The defendant will not commit another federal,
24 state or local crime. He will not unlawfully possess a
25 controlled substance. He'll refrain from any unlawful use of a

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1 controlled substance. He'll submit to one drug test within 15
2 days of release from imprisonment and at least two more
3 thereafter. He'll cooperate in the collection of DNA as
4 directed by the probation officer.

5 He'll comply with the standard conditions of
6 supervision 1 through 12, along with the following special
7 conditions. He'll participate in an outpatient -- hold on one
8 second. He'll participate in an outpatient drug treatment
9 program as approved by the probation office, which may include
10 testing to determine whether he's reverted to using drugs or
11 alcohol. He'll contribute to the cost of services rendered
12 based on ability to pay or the availability of third-party
13 payment. I authorize the release of any evaluations and
14 reports, including the presentence report, to the substance
15 abuse provider.

16 The defendant will submit his person and any property,
17 residence, vehicle, papers, computer, other electronic
18 communication or data storage devices or media and effects to
19 search at any time, with or without a warrant, by any law
20 enforcement or probation officer with reasonable suspicion
21 concerning violation of a condition of supervised release or
22 unlawful conduct by the defendant and by any probation officer
23 in the lawful discharge of the officer's supervision functions.

24 I recommend that the defendant be supervised by his
25 district of residence.

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1 I'm imposing the mandatory \$100 special assessment on
2 each count for a total of \$200, which is due immediately.

3 I'm not imposing a fine based on inability to pay.

4 Does either lawyer know of any legal reason why the
5 sentence I've described should not be imposed?

6 MS. NICHOLS: Judge, for the record, I may have
7 misheard, but I heard you say four years on Count Four, and I
8 think it's Count Fourteen that you meant four years for, for
9 supervised release before.

10 THE COURT: You are quite right. Thank you.

11 MR. EPSTEIN: No objection.

12 THE COURT: All right. Then the sentence I've
13 described is the sentence I impose. It's the sentence I find
14 sufficient, but not greater than necessary, to serve the
15 purposes of sentencing.

16 Mr. Frazier, you have the right to appeal your
17 conviction and sentence, except to the extent you've given up
18 that right through your guilty plea or your plea agreement. If
19 you think you have grounds to appeal and you're unable to pay
20 the costs of an appeal, you can apply for permission to appeal
21 without paying. Any notice of appeal must be filed within 14
22 days of entry of the judgment of conviction, and Mr. Epstein
23 will assist you with that.

24 Are there open counts?

25 MS. NICHOLS: Yes, your Honor.

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1 THE COURT: What are they?

2 MS. NICHOLS: The underlying indictments, your Honor.
3 We'll move to dismiss those at this time.

4 THE COURT: The underlying indictments are dismissed
5 as to this defendant.

6 Mr. Frazier, I know this is a long time. It could
7 have been longer. I went below the guidelines and below the
8 recommended sentence because I think, unlike a lot of people I
9 see, you do have the brains to straighten yourself out.

10 I couldn't go as low as you wanted because what you
11 did is just too serious, but I hope that you'll use your time
12 inside productively, whether that's a job or taking courses. I
13 hope it is a job. I hope you learn the satisfaction of doing
14 an honest day's work and getting an honest day's pay.

15 And you're still going to be young when you get out.
16 You're not a kid anymore, and it's good that you want to put
17 this all behind you. You're going to have many decades of life
18 ahead of you when you get out. And you're lucky that you're
19 going to have a fiancée or a wife waiting for you. Most people
20 don't.

21 So, I really, really, really hope I don't see you
22 again. You're going to be on supervised release. It's not the
23 same as state parole. The probation officers here really want
24 to help you stay on track. They feel like they've failed if
25 they have to violate you.

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1 So, when you get out, I hope you don't have the
2 attitude that the probation officers are a problem. They're
3 here to help you. They can help you get a job. They can help
4 you find housing. They can help you go to school if that's
5 what you want to do. If you find yourself slipping back into
6 your old ways, they can help you stay on track.

7 So, I hope you'll regard them as support for you as
8 you straighten out your life, which you say you want to do.
9 And you recognize that you let the people behind you down. And
10 I hope that everything you said today is going to stay in the
11 front of your mind while you finish your time and after you get
12 out.

13 The best thing that can happen is we don't see each
14 other again, because that means you've completed your
15 supervised release, you're back on track, you're living a good
16 life as a free person, a free, law-abiding person. So I wish
17 you luck.

18 Anything else we should do this morning?

19 MS. NICHOLS: There are open counts in the S4, too.
20 We would just like to move to dismiss all the open counts. I
21 think it's Count One in the S4 and Count Two he's also charged
22 in, as well as the underlying indictments.

23 THE COURT: Okay. Counts One and Two in the S4, as
24 well as the underlying indictments, are dismissed as to this
25 defendant.

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1 Thank you.

2 MS. NICHOLS: Thank you.

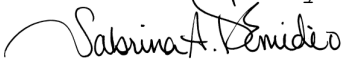
3 MR. EPSTEIN: Thank you.

4 He'll be designated as close to Orange County as
5 possible?

6 THE DEPUTY CLERK: It will be in the judgment.

7 - - -

8 Certified to be a true and correct
9 transcript of the stenographic record
10 to the best of my ability.

11 
12 U.S. District Court
13 Official Court Reporter

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